

PETER JAMES O'BRIEN

MARCH 10, 1958.—Committed to the Committee of the Whole House and ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 4073]

The Committee on the Judiciary, to whom was referred the bill (H. R. 4073) for the relief of Peter James O'Brien, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments are as follows:

Page 2, line 10, strike "appropriated" and insert "appropriated".

Page 2, lines 10 and 11, strike the words "in excess of 10 per centum thereof".

PURPOSE

The purpose of the proposed legislation is to pay Peter James O'Brien, of Minneapolis, Minn., the sum of \$10,000 in full settlement of his claims against the United States based on the death of his son, Mark James O'Brien, at the United States naval air station, Minneapolis, Minn., on June 6, 1947, when a plane occupied by Mark James O'Brien was struck by another plane as it was about to take off on a Naval Reserve indoctrination flight.

STATEMENT

On June 6, 1947, the son of the claimant enlisted in the United States Naval Reserve. From the information presented to the committee and the testimony of a hearing on the bill held February 19, 1958, it is established that Mark James O'Brien, enlisted in the Naval Reserve at about 8 o'clock in the morning of June 6, 1947. After he had signed the necessary papers and was on his way home, he met a friend who was a pilot participating in the Naval Air Reserve program, This pilot, Charles Tag, had been scheduled to fly that morning and

was assigned a two-seat training plane to do some local flying. At that time Mr. Tag asked Mark James O'Brien if he would like to accompany him on the flight. They got the necessary clearances so that the newly enlisted naval reservist, Mark O'Brien, could fly with Mr. Tag, and they got into the plane. While the plane was waiting to take off it was struck by a landing Navy plane. Mr. O'Brien was taken to the Veterans' Administration Hospital at Minneapolis, Minn., where he died on June 8, 1947, as a result of the injuries he sustained in the accident.

Peter James O'Brien, the claimant named in H. R. 4073, filed a suit under the Federal Tort Claims Act to recover for his son's death, but the court held that he could not recover since the act did not extend to persons who were members of the military who were injured in the course of activity incident to their service (*Feres v. United States*, 340 U. S. 135 (1950)). The United States District Court for the District of Minnesota dismissed the suit and entered judgment for the United States, and the United States Court of Appeals for the Eighth Circuit affirmed that judgment (192 F.2d 948). The basis for this holding was that Mark James O'Brien was on an indoctrination flight which was construed to be a part of his Naval Reserve duty, and therefore his injuries were sustained in the course of activity incident to service within the meaning of the holding of the United States Supreme Court in the *Feres* case.

On the basis of the facts of this matter the committee has decided that Mr. Peter James O'Brien should be granted the relief provided for in H. R. 4073. Accordingly the committee recommends that the bill be considered favorably.

The adverse reports of the Veterans' Administration and the Department of Labor are as follows:

VETERANS' ADMINISTRATION,
Washington, D. C., November 14, 1957.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CELLER: Further reference is made to your letter of September 27, 1957, requesting a report by the Veterans' Administration relative to H. R. 4073, 85th Congress, a bill for the relief of Peter James O'Brien, which provides as follows:

"That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Peter James O'Brien, Minneapolis, Minnesota, the sum of \$10,000. The payment of such sum shall be in full settlement of all claims of the said Peter James O'Brien against the United States arising out of the death of his son, Mark James O'Brien, which occurred at the United States naval air station, Minneapolis, Minnesota, on June 6, 1947, when the plane occupied by the said Mark James O'Brien (a member of the Naval Reserve) was struck by another plane while awaiting an opportunity to take off on an indoctrination flight. Under the decision of the Supreme Court of the United States in *Feres versus United States*, decided September 4, 1950, action upon such claim may not be brought under the provisions of title 28 of the United States Code relating to tort claims because the death of the said Mark James O'Brien arose out of and was in the course of activity incident to his

service: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

Your attention is invited to the misspelling of the word "appropriated" in line 10, page 2 of the bill.

Bills with the same purpose as H. R. 4073 have been introduced in the Congress over a number of years. The most recent was H. R. 1529, 84th Congress, which was pending before your committee at the close of that Congress.

The records disclose that Mark James O'Brien (XC-6255169) enlisted in the United States Naval Reserve on June 6, 1947. Later, the same day, he accompanied a naval pilot on an indoctrination flight. While waiting to take off, the plane was struck by a landing Navy plane. Mr. O'Brien was taken to the Veterans' Administration Hospital, Minneapolis, Minn., where he died on June 8, 1947, as the result of general traumatic injuries sustained in the accident.

On July 2, 1947, Mr. Peter James O'Brien, the serviceman's father, filed claim for death compensation with the Veterans' Administration. Under existing law, death compensation may be paid to a parent only upon establishment of the parent's dependency. While it was determined that the serviceman's death was service-connected, the claim for death compensation was disallowed on January 19, 1948, for the reason that Mr. O'Brien was not shown to be dependent within the meaning of the law, since his income at that time was deemed sufficient for his reasonable support and maintenance. He was informed of his right to submit an appeal to the Administrator of Veterans' Affairs from this disallowance as well as of his right to file a new claim at any time that his income was materially reduced or became insufficient to cover his reasonable support and maintenance. No appeal was filed but a second application for death compensation was submitted to the Veterans' Administration on September 11, 1957. It was disallowed, on September 25, 1957, for the same reason. The claimant was again informed of his right to appeal and of his right to reopen the claim by the submission of evidence tending to show that his income is insufficient to cover his reasonable support and maintenance.

Mr. O'Brien, as special administrator of the estate of Mark James O'Brien, filed suit against the United States in the United States District Court for the District of Minnesota, to recover damages for the death of his son allegedly caused by the negligence of a United States Navy pilot. The suit was filed pursuant to the provisions of the Federal Tort Claims Act (60 Stat. 842), which act was repealed and reenacted in substance as title 28, United States Code, sections 2671-2680, by the act of June 25, 1948. The district court dismissed the suit and entered judgment for the United States. On December 27, 1951, the United States Court of Appeals for the Eighth Circuit affirmed that judgment (192 Fed. 2d 948), holding that under the Federal Tort Claims Act for the United States is not liable for injuries to servicemen where the injuries arise out of, or are suffered in the course of, activity incident to military service.

H. R. 4073 proposes to pay Mr. O'Brien \$10,000 "in full settlement of all claims of the said Peter James O'Brien against the United States arising out of the death of his son, Mark James O'Brien." Since the claimant has recently been found not to be dependent within the meaning of the law and therefore ineligible for death compensation payments, the enactment of H. R. 4073 would, of course, have no effect, at this time, on Mr. O'Brien's eligibility for such benefits. In the event that his income, in the future, should become insufficient to cover his reasonable support and maintenance, he would be eligible for payment of death compensation benefits. However, the enactment of this bill employing such specific language as that quoted above would require the Veterans' Administration, in such event, to deny payment of death compensation to Mr. O'Brien. If the intent of the bill is otherwise, clarification of the matter is indicated.

The circumstances of the case have been carefully considered and no reason is apparent why it should be accorded special legislative treatment. To single out this case for preferential treatment by awarding the lump-sum payment proposed by the bill would be discriminatory against others similarly situated and might prove to be a costly precedent.

It should be noted that an alternative death benefit program is provided by the Federal Employees' Compensation Act for specified classes of survivors of certain naval reservists, among others, who died while performing military duty at the time of Mark O'Brien's service. In this connection, it is believed that your committee may desire to obtain the views of the Secretary of Labor with respect to H. R. 4073.

The Veterans' Administration does not believe that private bills of this nature should receive favorable consideration.

Advice has been received from the Bureau of the Budget that there would be no objection to the submission of this report to your committee.

Sincerely yours,

H. V. HIGLEY, *Administrator.*

DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, January 27, 1958.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.*

DEAR CONGRESSMAN CELLER: This is in response to your request for this Department's comments on H. R. 4073, a bill for the relief of Peter James O'Brien.

This bill would authorize the payment of \$10,000 to Peter James O'Brien, of Minneapolis, Minn. This payment is to be in full settlement of all claims against the United States arising out of the death of his son, Mark James O'Brien.

This Department's comments are related only to a consideration of H. R. 4073 as a claim under the Federal Employees' Compensation Act. The bill has not been considered in the light of any possible liability of the United States under any other statute.

The records of the Bureau of Employees' Compensation of this Department show that Mark James O'Brien died on June 8, 1947, at the age of 19 as a result of injuries received 2 days earlier in the line of duty while the deceased was on active duty as a member of the Organized Reserve. At the time of receiving these injuries, the deceased naval reservist was an authorized passenger on a plane participating in a squadron flight which was struck prior to takeoff by a landing naval aircraft.

Claim for compensation as an alleged dependent of the deceased was filed under the Federal Employees' Compensation Act by his father, Peter James O'Brien on July 16, 1947. The Bureau found that the claim was within the purview of the act, but that the father's claim was not supported by proof that he was dependent upon the deceased for support at the time of the latter's death. Although Mr. O'Brien was advised of the deficiency in his claim and was given an opportunity to perfect it, he did not do so. Consequently, this case was closed by the Bureau.

The death of Mark James O'Brien occurred under circumstances which bring it within the scope of the Federal Employees' Compensation Act. Under this act, a parent of a deceased employee must be partially or completely dependent upon the employee at the time of the employee's death. This case is no different from others where a reservist dies from injuries received in the line of duty and there is no showing that he is survived by dependents who may qualify for compensation benefits. This Department is opposed to a bill which would single out this claimant for preferential treatment under the act over others similarly situated.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

JAMES T. O'CONNELL,
Under Secretary of Labor.

○

